

**COMPLAINT 2007 – NO. 1**  
**In Re Haler**

September 27, 2007

**REASONABLE CAUSE DETERMINATION – ORDER OF DISMISSAL**

**I. Nature of the Complaint** – special privileges and use of public resources

The Complaint (Exhibit 1) was filed on February 14, 2007. The allegations may be summarized as follows:

- a. Representative Haler (Respondent) used his legislative position to “strong-arm” the Richland Mayor (Rob Welch) and other city officials to look the other way on Northwest Tire’s business license problems with the City of Richland (City).
- b. Respondent used his influence to have the personal life of Mayor Welch investigated, in apparent retaliation for the City’s investigations of City employee Jim Penor. In addition it is alleged Respondent used his influence to give directions to city employees behind the backs of the Mayor and the City Council. These “directions” would include the allegation that the Respondent sought to halt the investigation of Penor through a phone call to City Manager, John Darrington.

The statutes at issue are RCW 42.52.070;

Except as required to perform duties within the scope of employment, no state officer or state employee may use his or her position to secure special privileges or exemptions for himself or herself, or his or her spouse, child, parents, or other persons.

and RCW 42.52.160;

- (3) No state officer or state employee may employ or use any person, money, or property under the officer’s or employee’s official control or direction, or in his or her official custody, for the private benefit or gain of the officer, employee, or another.
- (4) This section does not prohibit the use of public resources to benefit others as part of a state officer’s or state employee’s official duties.
- (5) ...

**II. Jurisdiction and Procedure**

The Board has both personal and subject-matter jurisdiction.

### **III. Reasonable Cause**

Based upon the investigation and the facts which most likely would be established in a hearing, it is determined that (1) no reasonable cause exists to believe the Respondent violated the Ethics Act (Act) through the use of his legislative position to “strong-arm” the Richland Mayor and other city officials to ignore Northwest Tire’s (NWT) business license problems with the City of Richland (City), or that Respondent used his office to retaliate against the Mayor by seeking an investigation of the Mayor’s personal life because of internal City investigations of a friend of the Respondent; and (2) that no reasonable cause exists to believe that Respondent violated the Act when he threatened to go to the Attorney General with his concerns that State and/or Federal laws may have been violated in the City’s investigation.

### **IV. Background**

Respondent was a member of the Richland City Council (Council) from 1990 until 2004 and served as the mayor from 1996-2000. The City has a “weak mayor” form of governance with the mayor chosen by fellow council members. The Council voted to replace Respondent as mayor with councilperson Bob Thompson and in 2006 the Council replaced Thompson with Rob Welch who currently serves as mayor.

Respondent was elected to the Legislature in the 2004 general election. Jim Penor was his campaign manager and Respondent describes Penor as his friend.

Jim Penor resigned as a city employee in the spring of 2007 following investigations into his conduct in his capacity as an employee. The investigative report concludes that among other things Penor used or authorized the use of city equipment and city employees for the benefit of NWT. NWT facilities are adjacent to the city solid waste landfill where Penor worked as landfill manager. Penor is Rep. Hankins son-in-law and is a part-owner of NWT.

### **V. Determinations of Fact**

1. Respondent had various contacts with city officials during 2006 and early 2007. Most of these (summer 2006 meetings with Welch and January, 2007 meeting with Darrington) were not requested by Respondent and the agenda was set by others.

2. Respondent maintained an interest in the workings of city government after he left the council but with the exception of the February 5, 2007 phone call to Darrington there is no direct evidence he tried to manipulate or control the functions or decisions of city government.
3. The case is replete with rumor, hearsay, suspicion and contradictions.
4. Respondent had a close, personal and professional relationship with former city employee, Jim Penor. No facts were discovered which identify Respondent as a player in the Penor investigation(s) with the exception of the February 5 phone call. The results of the city's last investigation of Penor have been published and Respondent is not identified in that report as a player.
5. Respondent did not have any involvement, such as reviewing or analyzing, in the proposed contract for the sale of the land next to the city landfill to NWT.
6. There are no facts which show or indicate that Respondent used his office or public resources in an attempt to influence decisions made relative to NWT's business license. No witnesses have been identified who can place the Respondent at any meetings between NWT and the City concerning that license.
7. The allegations that Respondent threatened to use or used his legislative office to investigate the personal life of Mayor Welch are challenged by the following:
  - a. Mr. Darrington's verbal report to the Mayor, that Respondent was going to the Attorney General to seek an investigation, was understood by the Mayor to be a personal investigation. Mayor Welch did not speak directly to Respondent on this issue. Respondent will testify that the reference to the Attorney General and the Mayor was directed at city actions in the investigations of Penor and Respondent's anger about how those were being conducted. Respondent's position is that "yes," he did say something to the effect that maybe the Attorney General would be interested in what the City and the Mayor were doing to the rights of Penor. Moreover, Darrington's FAX (Exhibit 2) which relayed Respondent's message to the City Council must be reasonably read as an intent to go to the Attorney General in regards to the treatment of Penor and not as a retaliatory threat to investigate the personal lives of the Mayor and Mr. Thompson.
  - b. With respect to claims that Respondent was involved with others in investigating the Mayor as part of a plan of retaliation, the probable facts do not seem persuasive. It seems more probable that Respondent repeated portions of conversations he was not part of, including a conversation between the Sheriff and Rep. Hankins about the Mayor's first marriage. There was an individual named Mr. Moore who was interested in the personal life of the Mayor and who, it was thought by some, was

interested in challenging the Mayor for his council seat. Respondent states he will testify that Jim Penor told him that Moore was investigating the Mayor. Mr. Penor will testify that Mr. Moore is a family friend of the Penor's. Respondent repeated in the community what he had been told by Rep. Hankins and Jim Penor. In addition, the Mayor was told by city administrative personnel that Moore had visited city offices looking for information about the Mayor. Mayor Welch concluded, especially after Darrington's rendition of the February 5 phone call with Respondent, that the Respondent was investigating him.

8. On February 5, 2007 the Respondent phoned John Darrington after being told by Penor that the City had reopened the investigation of Penor. Respondent will testify that he had been told by Darrington, in a meeting requested by Darrington on other issues, that the Penor investigations and the difficulties with NWT had been concluded. Mr. Darrington will confirm that he told Respondent (and Rep. Hankins) that there would be no more investigations.
9. Respondent admits he used his legislative phone to make the call, lost his temper with Darrington and expressed his intent to go to the Attorney General in his legislative capacity over the matter. Respondent further acknowledges that he told Darrington to "knock it off."
10. The Attorney General was not contacted and it appears Respondent has had no contact with city officials on these issues subsequent to the February 5 phone call.

## **XI. Precedent**

The Board has issued a number of opinions which have addressed RCW 42.52.070 (special privileges) and RCW 42.52.160 (improper use of public resources). These include, but are not limited to, Advisory Opinions 1995-No.1 and 2006-No.1, and Complaint Opinions 1997-No. 1, 1999-No's. 1&2, 2003-No.1, 2004-No.2, 2005-No's.7&9, 2006-No's.1&3, and 2007-No.2.

The statutes are often analyzed with little distinction between them other than a .160 violation would require use of a public resource which is more narrow analysis than a .070 violation dealing with improper use of position. Opinions have concluded it is possible to violate both statutes through improper use of a public resource.

The most recent opinions pertinent to this case are Advisory Opinion 2006 – No. 1 and Complaint Opinions 2006 – No. 4 and 2007 – No. 2.

### Advisory Opinion 2006 – No. 1

1. .070 permits use of legislation position when performing duties within the scope of employment.
2. .160 permits use of public resources as part of official duties.

3. A threshold question is whether there is a tangible legislative nexus with the contemplated use of position or resources or whether that nexus is negligible.
4. Permissible non-advocacy use of position or resources could include acting in an ombudsperson capacity, acting as a mediator or performing an investigative function.
5. When a legislator has a sufficiently strong personal interest or benefit, the ombudsperson role will be carefully examined.
6. A legislator may use position and/or public resources to advocate on behalf of a constituent in the resolution of a dispute between the constituent and a government office or government official but this use is subject to the laws against undue influence and special privilege.
7. Improper means/improper use of position will negate the otherwise permissible intervention with a government office or government official on behalf of a constituent. (emphasis added)
8. Examples (non-exclusionary) of improper means could be evidenced by threatening communications. Examples of communications which carry a high risk for being perceived as threatening are listed on page 14 of the manual and taken from the cases. None of these examples are pertinent to this case.

#### Complaint 2006 – No. 4 – Schmidt

The Board concluded that .070 and .160 had been violated when Respondent angrily phoned a constituent and demanded concessions on behalf of another constituent, threatening adverse consequences unless the concessions were granted, and later utilizing a public resource in part of the exchange. Board reiterated that the “improper means” analysis was not limited to cases involving legislators and state agencies.

#### Complaint 2007 – No. 2 – Roach

The complaint alleged that Respondent used her position as a legislator to intervene with the Department of Corrections to secure special privileges for her son. The Board concluded she had not used her position to improperly intervene after an investigation produced no witnesses, documents or records to indicate she was involved in asserting influence in agency decisions relative to the reclassification or placement of her son.

The Board concluded that absent facts which show Respondent improperly used her position, “...Respondent cannot be held liable under the Act for subjective determinations reached by DOC supervisors which may have been based in whole or in part on Respondent’s status as a legislator...”

### **IX. Summary**

Respondent’s phone call to City Manager, John Darrington appears to have been made out of frustration with the fact that Mr. Penor was again being investigated and this was

taking place notwithstanding Darrington's recent assurances that there would be no more investigations.

As a legislator, Rep. Haler may certainly pick up the phone on a single occasion and speak up for a constituent/friend on an issue between the constituent and a government office or government official (Advisory Opinion 2006 – No.1).

Rep. Haler did not use improper means when intervening on behalf of Penor because his expressed intent to go to the Attorney General was directed at the protection of Mr. Penor's rights, and not at the personal lives of Mayor Welch or Mr. Thompson.

There are no facts to support the theory that Respondent used his office in any other way for personal gain or in an effort to secure special privileges for himself or another (RCW 42.52.070 and .160).

**X. Conclusion and Order**

Based upon a review of the Complaint and the Board's investigation, the Board determines that there is not reasonable cause to believe that Rep. Haler committed a violation of RCW 42.52.070 or RCW 42.52.160. The Complaint is, therefore, dismissed.

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David R. Draper, Vice-Chair

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Date